

RUFUS L. BAKER.

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FEBRUARY 11, 1860.—Reported from the Court of Claims; committed to a Committee of the Whole House, and ordered to be printed.

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The COURT OF CLAIMS submitted the following

REPORT.

*To the honorable the Senate and House of Representatives of the United States in Congress assembled:*

The Court of Claims respectfully presents the following documents as the report in the case of

RUFUS L. BAKER *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Claimant's commissions and documents admitted as evidence in the cause, transmitted to the Senate.
3. Other documents withdrawn from the files of the Senate and filed by claimant in cause, transmitted to the Senate.
4. Deputy solicitor's brief.
5. Opinion of the court adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the  
[L. S.] seal of said court, at Washington, this 5th day of December,  
A D. 1859.

SAM'L H. HUNTINGTON,  
*Chief Clerk Court of Claims.*

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UNITED STATES COURT OF CLAIMS.

RUFUS L. BAKER *vs.* THE UNITED STATES.

*To the honorable the judges of the Court of Claims:*

The petition of Rufus L. Baker, of Windham, in the State of Connecticut, respectfully sheweth: That your petitioner, in the year 1827, received a brevet of major of ordnance in the army of the United States, to rank from the 24th May, 1827. That said brevet was conferred on your petitioner under and by virtue of the authority

conferred by the 4th section of an act of Congress approved on the 6th day of July, 1812, entitled "An act making further provision for the army of the United States, and for other purposes," (2 Stat. at Large, 785,) by which section it is enacted: "That the President is hereby authorized to confer brevet rank on such officers of the army as shall distinguish themselves by gallant actions or meritorious conduct, or who shall have served ten years in any one grade: *Provided*, That nothing herein contained shall be so construed as to entitle officers so brevetted to any additional pay or emolument, except when commanding separate posts, districts, or detachments, when they shall be entitled to and receive the same pay and emoluments to which officers of the same are now or may hereafter be allowed by law."

The act of Congress of the 16th April, 1818, entitled "An act regulating the pay and emoluments of brevet officers," (3 Stat., 427,) enacts: "That the officers of the army who have brevet commissions shall be entitled to and receive the pay and emoluments of their brevet rank *when on duty and having a command according to their brevet rank, and at no other time.*"

Your petitioner further shows that he held the said rank of brevet major of ordnance from the said 24th May, 1827, to the 6th July, 1838, when he was promoted to a majority; that during all said time subsequent to the 1st May, 1828, he was in command of the arsenal at Allegheny county, in the State of Pennsylvania, which was an arsenal of construction, and one of the principal arsenals of construction in the United States; that during said period, the average number of men under his command was equal to that of a major in the line; that during said period the public property in his hands amounted to a million and a half of dollars, and the disbursements in a single year, during said period, exceeded \$100,000; and from the importance of the works, the number of men employed, the responsibilities of the station, and the experience required for the discharge of the duties of the post, the command was one in all respects equal to the rank of major.

Your petitioner would further show that in the discharge of the duties of his office, he was compelled, during a portion of said period, to use his own horses, and that he employed and paid from his private funds the number of servants allowed to a major.

During said period he claimed the said compensation, but the same was refused, until allowance was made for a portion of said period by Mr. Poinsett, Secretary of War, from the 1st November, 1834, to the 6th July, 1838, the grounds of which allowance are shown by the following communication from Mr. Poinsett:

"WAR DEPARTMENT, January 22, 1838.

"The principle upon which the claim of Brevet Major Baker, of the ordnance corps, for an allowance of the pay and emoluments of his brevet rank, was sanctioned by this department, is founded upon the act of Congress of April 16, 1818, which enacts that the officers of the army who have brevet commissions shall be entitled to and receive the pay and emoluments of their brevet rank when on duty and having a command according to their brevet rank, and at no other

time. It appears that the command held by Major Baker from the year 1828 to the present time is one of the first importance in his corps, and fully equal, in its numerical force and responsibilities, to the command of a major of ordnance; and, accordingly, this department sanctioned his application for the pay and allowances of his brevet rank from the 1st day of August, 1837, but deemed it proper that a retrospective allowance, involving an amount not included in previous estimates and appropriation, should receive a legal sanction.

“J. R. POINSETT.”

And the nature of the service of your petitioner is shown by the following communication from Colonel Bomford, the chief of the Ordnance department:

“ORDNANCE OFFICE,  
“*Washington, February 1, 1838.*

“SIR: It appears from the records of the office that the number of officers and men composing your command at the Allegheny arsenal, during the several years herein stated, was as follows:

“In the year 1828, 62; in the year 1829, 83; in the year 1830, 61; in the year 1831, 47; in the year 1832, 50; in the year 1833, 55; in the year 1834, 55; in the year 1835, 61; in the year 1836, 117; in the year 1837, 145; and that a number, estimated at the lowest at *thirty* men, and not included in the foregoing reports to this office, were likewise attached to your command during the years 1830, 1831, 1832, 1833, 1834, and 1835, thus augmenting your command during the whole time to a force exceeding the command of a captain. The foregoing numbers vary in some respects from those stated in my letter to the Secretary of War of January 2 last, owing to the omission in that letter of the officers of your command.

“Very respectfully, sir, your obedient servant,

“G. BOMFORD,  
“*Colonel of Ordnance.*

“Major R. L. BAKER.”

“ORDNANCE OFFICE,  
“*Washington, January 2, 1838.*

“SIR: A letter has been received from Major Baker, in which he requested this department to state the nature of his duties and command between April, 1828, and the 1st August, 1837. Agreeably to his request, I have the honor to state that his duties have been very arduous and generally the same during the period alluded to; that the number of men of his command varied at different periods as the exigencies of the service required; for instance, in 1828 he commanded an average number of 57 men; in 1829, an average number of 78; in 1837, an average number of 141. During the present year, the average may be near those in the preceding year; but the responsibility attached to his command, which is great, may be said to have been nearly the same from 1828 to 1837.

“I have the honor to be your obedient servant,

“G. BOMFORD, *Colonel of Ordnance.*

“Hon. J. R. POINSETT, *Secretary of War.*”

Your petitioner, therefore, claims that the opinion of the officer in command of his corps, and the decision of the Secretary of War, as well as the nature and character of the services themselves, present the strongest and most conclusive evidence of the nature of his command; and that he is entitled by law to the pay and emoluments of a major of ordnance from the 1st May, 1828, to the 31st October, 1834, payment from the latter date to July 7, 1838, the date of his promotion, having been made by order of the Secretary of War.

The following has been the action of Congress on this claim :

During the second session of the 25th and 26th Congresses the petition was presented to the Senate and referred to the Committee on Military Affairs, who were discharged. During the 2d session of the 30th Congress the Committee on Military Affairs reported a joint resolution, which passed the Senate, and in the House of Representatives was reported upon favorably by the Committee on Military Affairs, referred to the Committee of the Whole House, but was not reached in the order of business.

R. L. BAKER, [L. s.]  
Late Lieutenant Colonel of Ordnance.

Witness : CHAS. FITCH.

WINDHAM, WINDHAM COUNTY, STATE OF CONNECTICUT,  
February 19, A. D. 1856.

Personally appeared before me Rufus L. Baker, signer of the foregoing petition, and made oath that he believes all the facts set forth in said petition to be true.

Before me.

CHAS. FITCH,  
Justice of the Peace.

IN THE COURT OF CLAIMS.—No 507.

RUFUS L. BAKER *vs.* THE UNITED STATES.

*Brief of the Deputy Solicitor for the United States.*

This is a claim for brevet pay.

The petitioner held, during the whole or the greater part of the period embraced by this claim, two commissions, by one of which the President did appoint him captain of ordnance in the service of the United States, and by the other did confer on him the rank of major by brevet in the army of the United States.—(See copies of his commissions.)

The act "regulating the pay and emoluments of brevet officers," approved April 16, 1818, enacts "that officers of the army who have brevet commissions shall be entitled to and receive the pay and emolument of their brevet rank when on duty and having a command according to their brevet rank, and at no other time."



The petitioner alleges that he was on duty and had a command according to his brevet rank from the 1st of May, 1828, to the 31st of October, 1834; that during this period he (Baker) was not permitted to receive the pay of his brevet rank.

The command held by the petitioner during the period in question was that of Allegheny arsenal, a military establishment belonging to the Ordnance department, and at which there were employed during the period charged for a number of men, varying from 62 to 83, some of whom may have been enlisted men, and others were ordinary hired men, employed by the day or month under contract.—(Report of Ordnance department, December 12, 1857.)

For the United States it is contended that in order to entitle the petitioner to recover he must have fulfilled two conditions under the act of 1818:

- 1st. He must have been on duty according to his brevet rank; and,
- 2d. He must have had a command according to his brevet rank.

And it is also contended that he fulfilled neither of these conditions.

*Of rank as distinguished from office.*

In the military establishment officers generally, but not always, have rank.

Military storekeepers (keepers of military stores) are commissioned officers, and form part of the military establishment, (act March 2, 1821, chap. 13, sec. 9, 3 Stat., 615,) and are amenable to the rules and articles of war, (art 36,) yet have no rank. Paymasters in the army were without rank until it was conferred upon them by the act of March 3, 1847, chap. 61, sec. 13, (9 Stat., 184;) and medical officers first received rank by the act of February 1, 1847, chap. 8, sec. 8, (9 Stat., 123.)

Rank is generally annexed to the office. The adjutant general, commissary general, paymaster general, and surveyor general have the rank of colonel; the quartermaster general has the rank of brigadier general. But rank may depend upon the duties performed, as under the act of March 3, 1813, chap. 52, secs. 1 and 2, (2 Stat., 819,) eight quartermaster generals were appointed, of whom the one "attached to the principal army" was to rank as a brigadier general, the others as colonels.

This distinction is presented by the two commissions in this case: the one *appoints*; the other *confers rank*.

*Of brevet rank as distinguished from other rank.*

The army of the United States consists of a fixed number of officers and men constituting an organization, which will be found detailed in every annual army register.

The number of these officers cannot be increased without law; each holds an office, and his commission expresses the office which he holds.

To each of these offices is generally attached a certain rank, sometimes expressed in the title of the office, as colonel of the engineers;

and sometimes separately given by law, as adjutant general with the rank of colonel.—(Act of March 2, 1821, sec. 6, 3 Stat., 615.)

Besides the commissions which confer offices, with the rank attached thereto, the President can confer upon such officers additional commissions which confer rank only. Such additional commissions are styled brevet commissions. Thus, the late Adjutant General Jones held the office of adjutant general with the rank of colonel, in his own department, attached thereto, and at the same time he held by brevet the rank of major general in the army.

These brevet commissions are not limited in number by law, as are those commissions which confer places in the organization of the army; but may be multiplied to any extent by the joint action of the President and the Senate under the acts of July 6, 1812, chap. 137, sec. 4, (2 Stat., 784,) and April 16, 1818, chap. 64, sec. 2. (3 Stat., 427.)

A brevet commission is a commission "in the army," not in any particular regiment or corps of the army. All brevet commissions are of the same tenor. A captain of ordnance, a captain of engineers, a captain of infantry, and a captain of cavalry, if commissioned majors by brevet, receive the same commission—that of "major by brevet in the army of the United States." Their brevet commissions neither recognize, nor confirm, nor create any difference between them on account of their previous rank. By brevet they are all majors and majors only.

That brevet rank is army rank, as distinguished from rank in regiments or corps, is well illustrated by a comparison of art. 24, sec. 13, and art. 2, sec. 14, of the articles of war adopted by the continental Congress, September 20, 1776.—(1 Journals, 489.) The first cited article, speaking of rank, directs that officers having brevets take place on courts-martial composed of different corps according to their brevets. The last cited article, speaking of courts-martial, directs that officers of different corps on courts-martial take the same rank which they hold *in the army*. Both provisions apply to the same state of facts, and are necessarily intended to be the same in sense; and the phrase *rank in the army*, used in the last, includes *brevet rank* as used in the first.

#### *Of the incidents of brevet and other rank.*

1st. *As to command*.—The commission by which an officer holds a place or "is mustered" in his own corps gives him, by its terms, the right to command in that corps; out of the corps his rights are defined by statutes—that is to say, by the 62d article of war as enacted in "An act for establishing rules and articles for the government of the armies of the United States," approved April 10, 1806, (2 Stat., 359,) which is in the following words:

"ART. 62. If upon marches, guards, or in quarters, different corps of the army shall happen to join and do duty together, the officer highest in rank in the line of the army, marine corps, or militia, by commission, there on duty or in quarters, shall command the whole, and give orders for what is needful to the service, unless otherwise

specially directed by the President of the United States, according to the nature of the case."

A brevet commission entitles an officer to precedence and command in certain cases prescribed by one of the articles of war, which is in the following words:

"ART. 61. Officers having brevets or commissions of a prior date to those of the regiment in which they serve may take place in courts-martial, and on detachments, where composed of different corps, according to the ranks given them in their brevets or dates of their former commissions; but in the regiment, troop, or company to which such officers belong, they shall do duty and take ranks, both in courts-martial and on detachments, which shall be composed of their own corps, according to the commissions by which they are mustered in the said corps."

In art. 3, p. 16, of the edition of Army Regulations, revised by General Scott and published by the War Department in 1825, is found the following construction of this article:

"18. The terms regiment and corps, as used in the 61st article of war, will be considered as synonymous."—(Decision of the President of the U. S., announced in orders, July 1, 1816.)

A brevet commission also renders an officer eligible, by the assignment of the President, to exercise command over permanently constituted bodies of troops, to the same extent as if such bodies were "detachments" within the above cited articles of war. Thus, General Jesup being quartermaster general with the rank of brigadier general, and not as such invested with the command of troops, yet having a brevet commission as major general, commanded as major general, by assignment of the President, a separate army in Florida.

2d. *As to pay.*—A brevet commission does not of itself entitle an officer holding it to pay. It might and probably would be otherwise if the brevet commission conferred an office instead of rank merely.

The absence of pay was formerly so prominent a characteristic of brevet rank that in James' Military Dictionary, the best extant, it is made the distinguishing ground of his definition, as follows:

"*Brevet rank* is a rank in the army higher than that for which pay is received. It gives precedence (where corps are brigaded) according to the date of the brevet commission.

"*The brevet*, a term used to express general promotion, by which a given number of officers are raised, from the rank of captain upwards, without any additional pay, until they reach the rank of major general, when, by a late regulation, they become entitled to a quarterly allowance."—(Edition of 1816.)

I find no act earlier than that of July 6, 1812, (2 Stat., 784,) giving brevet pay. So far as I can learn from the journals of the continental Congress, by the aid of the index, brevet pay was allowed only in exceptional cases, and brevets seem to have been conferred simply as honorable marks of distinction, as appears from the following resolutions, which are all that are pointed out in the index:

Resolution of April 30, 1778, (2 Journal, 532,) providing that brevets shall give no rank in the regiment, troop, or company, but only

on detachments and courts-martial ; nor shall they entitle officers to additional pay.

Resolution of January 13, 1779, (3 Journal, 182,) giving brevet rank to French volunteers about to return to France.

Resolution of February 13, 1779, (3 Journal, 200,) to the same effect.

Resolution of September 10, 1783, (4 Journal, 260,) informing the paymaster general that brevet commissions do not entitle to pay or emoluments, unless the same be expressed in the resolution granting such commissions.

For pay, then, brevet officers must look to statutory provisions and army regulations in accordance therewith.

*Of the statutes granting brevet pay and regulations auxiliary thereto.*

The provision, act of July 6, 1812, chapter 137, sec. 4, (2 Stat., 784,) respecting brevet pay is as follows : " Nothing herein contained shall be so construed as to entitle officers so brevetted to any additional pay or emoluments, except when commanding separate posts, districts, or detachments, when they shall be entitled to and receive the same pay and emoluments to which officers of the same grades are now or hereafter may be allowed by law."

The provision in the act of April 16, 1818, chap. 64, sec. 1, (3 Stat. 427,) is as follows :

" The officers of the army who have brevet commissions shall be entitled to and receive the pay and emoluments of their brevet rank when on duty and having a command according to their brevet rank, and at no other time."

The following regulations have been issued from time to time by the President to give effect to the act of 1818, and are all that are found in the successive editions of General Regulations for the Army.

The first is taken from the edition of Army Regulations promulgated in 1820, page 125, but was made, as the date attached to it shows, immediately after the passage of the act in 1818.

[May 8, 1818. " Brevet officers shall receive the pay and emoluments of their brevet commissions when they exercise command equal to their brevet rank ; for example, a brevet captain must command a company ; a brevet major and a brevet lieutenant colonel, a battalion ; a brevet colonel, a regiment ; a brevet brigadier general, a brigade ; a brevet major general, a division." ]

In the regulations of 1821 the same order, in the same words, is found in par. 18 of art 71.

In the regulations of 1825 (revised by Major General Scott) the provision on this subject is found in article 71, as follows :

" 1124. Brevet officers shall receive the pay and emoluments of their brevet commissions when they exercise command equal to their brevet rank ; for example, a brevet captain must command a company ; a brevet major and a brevet lieutenant colonel, a battalion ; a brevet colonel, a regiment ; a brevet brigadier general, a brigade ; a brevet major general, a division."

In the edition of 1834 the regulation is as follows :

"Officers who have brevet commissions shall be entitled to receive their brevet pay and emoluments when on duty under the following circumstances: a brevet captain when commanding a company; a brevet major when commanding two companies or when acting as major of the regiment; a brevet lieutenant colonel when commanding at least four companies or when acting as lieutenant colonel of the regiment; a brevet colonel when commanding nine companies of artillery or ten of infantry or dragoons, or a mixed corps of ten companies, or when commanding a regiment; a brevet brigadier general when commanding a brigade of not less than two regiments or twenty companies; a brevet major general when commanding a division of four regiments or at least forty companies; a brevet officer when assigned to a particular duty or command according to his brevet rank, although such command be not in the line, provided his brevet allowances are recognized in the order of assignment."

"To entitle officers to brevet allowances while acting as field officers of regiments according to their brevets, they must be recognized at general headquarters as being on such duty, and the fact announced accordingly in general orders."

In the edition of 1835 (p. 194) the regulation is identical with that just cited.

In the edition of 1841 the regulation is as follows:

"1255. Officers who have brevet commissions shall be entitled to receive their brevet pay and emoluments, when *on duty and having a command* according to their brevet rank, as follows:

"1. A brevet captain, when commanding a company.

"2. A brevet major, when commanding two companies or when on duty as major of the regiment.

"3. A brevet lieutenant colonel, when commanding at least four companies or when on duty as lieutenant colonel of the regiment.

"4. A brevet colonel, when commanding a regiment or at least two companies.

"5. A brevet brigadier general, when commanding a brigade of not less than two regiments or twenty companies.

"6. A brevet major general, when commanding a division of four regiments or at least forty companies.

"7. A *brevet* officer when assigned by the special order of the Secretary of War to a particular duty and command according to his brevet rank, although such command be not in the line: *provided* his brevet allowances are recognized in the order of assignment.

"1256. To entitle officers to *brevet* allowances while acting as field officers of regiments, according to their brevets, they must be recognized at general headquarters as being on such duty, and the fact announced accordingly in general orders."

In the last edition of regulations, issued January 1, 1857, the department gives a construction to the act of 1818, by par. 1176 and 1177, in the following words:

"1176. Officers are *on duty and have a command* according to their *brevet* rank only when assigned to their brevet rank by the President, with the appropriate actual command composed of different corps, or when serving on detachments composed of different corps with such



appropriate command. But in the regiment, troop, or company to which officers belong, they do duty and draw pay according to the commissions by which they are mustered in their own corps.

"1177. The following are the appropriate commands to each grade :

"For a captain, at least a company.

"For a major, at least 2 companies.

"For a lieutenant colonel, at least 4 companies.

"For a colonel, at least 1 regiment or 10 companies.

"For a brigadier general, at least 2 regiments or 20 companies.

"For a major general, at least 4 regiments or 40 companies.

"For a lieutenant general, at least 8 regiments or 80 companies."

### *Of the construction of the act of 1818.*

The early regulations in the foregoing series are often referred to as giving a construction to the act of 1818, and giving it a construction opposed to that for which I contend in this case.

The regulations in question may indicate the views of the then executive as to the construction of the statute, and may even in form seem to give it a construction, but such was not their purpose.

"The purpose of these regulations," [of 1818 and 1820,] says Mr. Attorney General Wirt, (1 Opinions, 549,) "then is merely to supply what positive legislation had wholly omitted, not to contradict it in anything which it had enacted."

The statutes had already designated the cases in which brevet officers would be on duty according to their brevet rank, but no statute had determined their commands. This was to be determined by regulations.

When then the regulations speak only of certain commands necessary to entitle officers to brevet pay, we are not to understand that no other condition is to be fulfilled.

I am not aware that the point which I shall make has ever been expressly decided by the department. I cannot find that it has been. But even if the executive department had so decided, and if the decision had been acted upon ever since the passage of the act, that fact should not be suffered to control the judgment of this court. Upon this point I rely upon the following language of the Supreme Court in *The United States vs. Freeman*, (3 How., 564,) in regard to claims for brevet pay under the act of 1818, and in which the construction which had been given by the executive departments to the act of 1818, from its passage down to the year 1846, was reversed. The court said: "Though what has been differently done is binding upon the government and cannot be recalled to the pecuniary disadvantage of any officer who may have received brevet pay and emoluments not according to the act of 1818, *no erroneous practice under it of however long standing can justify the allowance of a claim contested by government in a suit contrary to the true meaning and intent of that act.*"

And the rule is equally applicable to the other side, for the same court said, in *The United States vs. Dickson*, (15 Peters, 141:)

"The construction given to the laws by any department of the executive government is necessarily *ex parte* without the benefit of an

opposing government in a suit where the very matter is in controversy; and when the construction is once given, there is no opportunity to question or revise it by those who are most interested in it as officers deriving their salary and emoluments therefrom, for they cannot bring the case to the test of a judicial decision. It is only when they are sued by the government for some supposed default or balance that they can assert their rights. Their acquiescence, therefore, is almost from a moral necessity when there is no choice but obedience as a matter of policy or duty. But it is not to be forgotten that ours is a government of laws and not of men; and that the judicial department has imposed upon it, by the Constitution, the solemn duty to interpret the laws in the last resort; and however disagreeable that duty may be, in cases where its own judgment shall differ from that of other high functionaries, it is not at liberty to surrender or to waive it. The present question, then, must be decided upon the same principles by which we ascertain the interpretation of all other laws: by the intention of the legislature as it is to be deduced from the language and the apparent object of the enactment," (pp. 161, 162.)

*The act of 1818 requires that the brevet officer be on duty according to his brevet rank.*

The claimant denies that this condition is imposed by the act, and contends that the act requires the brevet officer to be "on duty" simply, without further qualification. He reads the act as requiring that the brevet officer have a command according to his brevet rank, and also that he be on duty.

The answer to this is, that all officers who have a command are on duty; no officer commands who is off duty; and therefore the condition that the officer have a command includes the condition that he be on duty; so that the construction contended for by the claimant makes surplusage of the words "on duty," and allows but one condition where the statute purports to make two. This is contrary to the established rules of construction, and cannot be allowed, if it may be avoided, by any other reasonable construction.

On the other hand, the construction I contend for gives a special effect to the words in question. An officer may be on duty according to his brevet rank and have no command; this is the case when he sits on courts-martial with officers of other corps; he takes place according to his brevet rank under the 61st article of war, but has no command. An officer may have a command according to his brevet rank and not be on duty according to his brevet rank; a major having the brevet rank of colonel may, in the absence of superior officers, command his own regiment; he has a command according to the rank of a colonel, but, being in his own corps under the 61st article of war, must do duty only according to the commission by which he is mustered therein—that of major; he commands the regiment because, as major, he is superior in rank to every other person in it; not because he is doing duty in his rank of colonel.

Each of these conditions applies to a state of facts of frequent occurrence. Brevet officers are daily sitting upon courts-martial com-

posed of officers of different corps; and brevet officers daily find themselves in commands belonging to the higher officers of their own regiments. Congress may well be supposed to have contemplated this notorious state of facts, and to have intended to deny brevet pay to any officer who fulfilled but one of these conditions, and to give it to those only who fulfilled both. I maintain that Congress has used apt words to express that intention.

Again, the expression used in this act is almost identical in terms, and is identical in sense, with the expression used in the 61st article of war. When, in that article, a captain is directed to "do duty and take rank according to the commission by which he is mustered," no one has ever doubted that the injunction is to do duty *as captain*; that the intent is not simply to command him to do duty, to be busy, not to be idle, but to prescribe the rank in which he shall do duty. The purpose of the article is not to guard against idleness, but to determine rank. So, in the act of 1818, I contend that the same expression is not meant simply to prohibit idle men—men not on duty—from getting brevet pay, but to determine the grade in which they must be serving in order to entitle them to pay.

*The petitioner was not on duty according to his brevet rank.*

While officers are serving in their own regiments or corps—in which case, under the 61st article of war, they "do duty and take rank \* \* \* according to the commissions by which they are mustered in the said corps"—such officers cannot fulfil the conditions imposed by the act of April 16, 1818.

In other words: the petitioner, while *doing duty and taking rank according to the commission of captain by which he was mustered in the ordnance corps*, could not at the same time be *on duty and having a command according to his brevet rank of major in the army*.

To do duty is to perform certain official acts; to exercise the functions of an office; and the acts which the petitioner did by virtue of his commission as captain, he could not have done by virtue of his commission as major.

*The petitioner had not a command according to his brevet rank.*

The second condition required by the act to entitle an officer to brevet pay is, that he must have had a command according to his brevet rank. The petitioner must show that he had a command according to the brevet rank of major. He shows that he was in command of Allegheny arsenal, and produces written opinions of high officers to the effect that this was equal to the command of a major of ordnance. Among these officers was the Secretary of War, Mr. Poinsett, who allowed him brevet pay for the same species of service from and after the 1st of August, 1837, but, while expressing the opinion that he was equally entitled to it for the preceding period, declined to order payment.

In considering what is the command appropriate to a given rank, we must look beyond the naked rank. Rank alone does not deter-

mine command ; if it did, all officers having the same rank would necessarily have the same appropriate command. But this is not the case. A paymaster has the same *rank* as a major of infantry, and a major of infantry has the same rank as major of engineers ; yet the appropriate command of one of these officers is not that of another. All have the same rank, but have not the same command.

If, then, the act of 1818 means to say that an officer, being by brevet a major, and having a command according to the rank of major, shall be entitled, &c., &c., it contains a latent ambiguity ; for there is no command according to the rank of major *qua major* ; or if there be, it is that of a major of infantry, according to the ruling of the Supreme Court in the case of *Wetmore vs. The United States*, (10 Peters, 647.) In that case, a paymaster being entitled to "the pay and emoluments of major," claimed those of major of cavalry ; but the court said, (p. 655,) "when the law speaks of a *major*, the term is most naturally considered as having been used in reference to such officers of that rank, and of such regiments, actually being of the army, or to the army as it exists ; and when it is used without *regimental designation implies a body of infantry, this arm of defence having been the main body of modern armies.*" Thus the claimant could derive no benefit from such a construction of the act as would require a command according to rank generally, not brevet rank specially.

But the act does require a command according to his *brevet* rank ; and what is the effect of this limitation ? If a soldier were asked what is the appropriate command of a colonel of infantry, he would say a regiment ; and if he were asked what is the appropriate command of the colonel of ordnance, he would say the ordnance corps. In each case he would look beyond the naked rank, and consider the description of force in which the rank is held. And so in this case must we. I maintain that the difference between the commissions of major by brevet in the army and major of ordnance is of the same nature as the difference between the commission of major of infantry and major of ordnance ; and that the condition of the act of 1818, requiring a command according to *brevet* rank, is as specific as if it had required a command in a certain *arm*. If this be so, the petitioner gains nothing by his attempt to show that his command was that of a major of ordnance, since he does not show that the commands of ordnance officers and brevet officers are the same.

How, then, should the appropriate commands of brevet officers be ascertained ? I answer by statute, if statutes had been passed ; and as the statutes are silent, then by the regulations of the President—the commander-in-chief of the army. That he has authority to assign duties to officers has been held by the Supreme Court in the case of *Gratiot vs. The United States*, (4 How., 80 ; ) and in that case the court said they had often held that army regulations have the force of law. And this mode of determining the commands of brevet officers was resorted to by the Supreme Court in the case of *United States vs. Freeman*, (3 Howard, 564,) where the court held generally (p. 566) that officers were entitled to brevet pay when exercising command according to the provisions of the regulations in force from time to

time. The case came up on a certificate of division from the circuit court of the United States for the district of Massachusetts; and the district court, in proceeding, after having received the answers of the Supreme Court, ruled as follows: (*United States vs. Freeman*, 1 W. and M., 45.)

"The act of April 16, 1818, ch. 64, 3 Stat., 427, on which the claim depends, requires that brevet officers, in order to receive pay as such, must be then on duty, and having a command according to their brevet rank, and at no other time.

"What, then, constitutes a command according to their brevet rank?

"By the Army Regulations of 1825, which governed this question till 1836, (3 How., 564,) it was provided that a lieutenant colonel by brevet must be considered to exercise a command equal to his brevet rank when he commanded a battalion.

"We entertain an opinion that whatever meaning may at times be affixed to the word *battalion*, it must by the spirit of this regulation, and the laws connected with it, be construed to mean here, at least, two organized companies, with their requisite officers as well as men.

\* \* \* \* \*

"In 1836 a new order was issued by the War Department requiring a still larger command for a brevet lieutenant colonel, in order to entitle him to extra pay, as 'four companies instead of two,' or to command as lieutenant colonel of a regiment. A like construction must be given to the word *company* here, in order to come within the spirit and reason of the allowance. It should be an organized company, and have a suitable number of officers as well as men."

Both the courts recognize the authority of the department to determine the command of a brevet officer, and they refer to the regulations alone to determine the command in the case before them. Both courts cite regulations enlarging or varying the commands of brevet officers. The regulations of 1836, says the district court, required a larger command than the regulations of 1825 for a brevet lieutenant colonel; but if commands of brevet officers are to be determined by reference to commands in regiments or corps, how could the former be enlarged or diminished without varying the latter? How could the appropriate command of a brevet lieutenant colonel be at one time two companies, and at another four, when a lieutenant colonel's command in the line remained the same at both periods?

We must look, then, to regulation alone, in the absence of statute, to determine the amount and description of force which constitute the appropriate command of brevet officers. The regulation in force during the period covered by this claim was that above cited from the edition of Army Regulations of 1825, revised by Major General Scott, and it determines the appropriate command of a brevet major to be a battalion. There is no pretence that the petitioner had command of a battalion; all that is shown is, that the average number of men under his direction, from 1828 to 1834, was ninety, exceeding the number in a company, but not equal to two companies, still less to a battalion, (see report from the Ordnance office of February, 1833;) nor were they organized as a battalion, nor could they



have been, as some were hired men on daily wages, (report of December 12, 1857.)

But the claimant not only fails to show not only that he had the command presented for the brevet rank of major, he fails even to show by *competent evidence* that the command he had was equal to, or appropriate to, or according to, the rank of major in the ordnance corps or in any corps.

He produces nothing on this point but the certificate of Mr. Secretary Poinsett, which affirms that Major Baker's command was equal in its importance, as well as in its numerical force and responsibility, to the command of a major of ordnance.

Importance and responsibility are subjects of opinion and judgment. They are incorporeal qualities, and no one will pretend that they form any part of the elements of a command. A company is but a captain's command, whether it guard the pass of a Thermopylæ or parade in the park on a gala day. The only tangible portion of the allegation is as to the numerical force; this force is shown by evidence, not before Mr. Poinsett, to have been partly composed of hired, not enlisted men, and it is a question of law, not to be determined by evidence, whether such hired men can constitute a command. The case above cited from 1 W. & M. determines that they cannot. Moreover, the only proper way to prove the quality of numerical force would be to state what numerical force a major of ordnance appropriately commands, and then to prove that the claimant commanded such a force. Mr. Poinsett states neither the appropriate command of a major of ordnance, nor the actual command of the claimant. It states only a conclusion which is incapable of being contradicted.

*Of the mischiefs which the act of 1818 was intended to remedy.*

To attempt to regulate pay according to the comparative importance of the duties performed instead of the command held, would introduce a thousand changing elements into the determination of the question, instead of the simple and invariable rule contemplated by the act of 1818—that is, the description of the military body under the officer's command. It would introduce a mode of determination infinitely less liable, and much more subject to abuse, than that which existed before the act of 1818 was passed, and which on account of the abuses practiced under it was superseded.

The 9th section of the act of July 6, 1812, gave brevet pay to officers commanding separate posts, districts, or detachments. Under this act, says Mr. Attorney General Wirt in his opinion of December 29, 1821, (1 Opinions, 525,) "separate posts and districts were created and multiplied as if to open a wide theatre for its more extensive operation; and there were few, if any, brevets in the army which did not draw brevet pay." And so says Mr. Berrien in his opinion of July 18, 1829, (2 Opinions, 231.) The President, under the act of 1812, "had thus the power, in the arrangement and distribution of the army, to increase the amount of brevet pay by multiplying the number of separate posts. In point of fact, I understand that shortly after the termination of the late war, this power was freely resorted

to as a means at the disposal of the Executive by which merit might be rewarded."

If this was the mischief to be remedied, it requires no argument to show that the construction which the claimant seeks to place upon the act of 1818 will not effect the object. Even under the act of 1812 some limit was imposed on the liberality of the Executive, by restricting the allowance of brevet pay to officers having certain defined military commands; but the construction contended for includes all these commands, (because all posts, districts, and detachments may be deemed important commands,) and it includes, besides, all other employments which, in the opinion of a liberal Secretary of War, may be deemed to be commands, and to be of a certain degree of importance—such as the charge of a survey, the construction of a fort, or the building of an aqueduct. Officers so employed have often drawn brevet pay.

In the foregoing view of the questions involved in this case, I have referred to no decisions of the War Department or opinions of the Attorneys General upon individual cases. The decisions of the former depend greatly on the notions of liberality entertained by the Secretary for the time being, or on the personal merits of the claimant; and the series is therefore too contradictory to be cited here as authority; while the opinions of the Attorneys General are equally unreliable, since they concern questions which, Mr. Wirt said, (1 Opinions, 547,) "do not depend on positive law only, but call for an intimate knowledge of army regulations and organization, which constitutes no part of the service of my profession." In regard to the opinions of Attorneys General, I will only say that I have found no opinion which acknowledges any other guide or rule in the determination of questions of command than the statutes and army regulations.

JNO. D. McPHERSON,  
*Deputy Solicitor.*

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IN THE COURT OF CLAIMS.

JUNE 6, 1859.

RUFUS L. BAKER *vs.* THE UNITED STATES.

Judge BLACKFORD delivered the opinion of the court.

This is a claim for the difference between the pay and emoluments of a captain of ordnance and those of a major by brevet, from the 1st of May, 1828, to the 31st of October, 1834. The amount claimed is not, in terms, stated in the petition.

The claimant was commissioned a captain of ordnance in the service of the United States on the 1st of June, 1832, to rank as such from the 30th of May of that year. Whilst he was such captain, to wit, on the 1st of September, 1829, the rank of major by brevet in the army of the United States was conferred on him, to rank as such from the 21st of May, 1827.

During the time for which this claim is made, viz: from the 1st of May, 1828, to the 31st of October, 1834, the claimant was a captain of ordnance, as aforesaid, and had the rank of a major by brevet, as aforesaid.

The question which this case presents is: was the claimant, under the circumstances of the case, entitled to the pay and emoluments of a major in the army at any time during the aforesaid period?

The act of Congress of 1818 on the subject is as follows:

"That officers of the army who have brevet commissions shall be entitled to and receive the pay and emoluments of their brevet rank when on duty, and having a command according to their brevet rank, and at no other time." (3 Stat. at L., 427.)

The following army regulation of 1825, in force during said period, is as follows:

"Brevet officers shall receive the pay and emoluments of their brevet commissions when they exercise command equal to their brevet rank; for example, a brevet captain must command a company; a brevet major and a brevet lieutenant colonel, a battalion; a brevet colonel, a regiment; a brevet brigadier general, a brigade; a brevet major general, a division." (See 3 Howard, 559, 566.)

The above act of 1818 and said army regulation of 1825 govern this case. They show that, to establish this claim, the claimant must prove that during the period embraced by the claim he was on duty, and had the command of a battalion in the army.

Now, what was the command of the claimant during said period?

The following letters are the only evidence on the subject.

"ORDNANCE OFFICE,

"Washington, February 1, 1838.

"SIR: It appears from the records of this office that the number of officers and men composing your command at the Allegheny arsenal, during the several years herein stated, was as follows, viz:

" In the year	1828	-	-	-	-	-	-	62
	1829	-	-	-	-	-	-	83
	1830	-	-	-	-	-	-	61
	1831	-	-	-	-	-	-	47
	1832	-	-	-	-	-	-	50
	1833	-	-	-	-	-	-	55
	1834	-	-	-	-	-	-	55
	1835	-	-	-	-	-	-	61
	1836	-	-	-	-	-	-	117
	1837	-	-	-	-	-	-	145

"And that a number estimated at the lowest at thirty men, and not included in the foregoing reports to this office, were likewise attached to your command during the years 1830, '31, '32, '33, '34, and '35, thus augmenting your command during the whole time to a force exceeding the command of a captain. The foregoing numbers vary in some respects from those stated in my letter to the Secretary

of War of the 2d of January last, owing to the omission in that letter of the officers of your command.

"Very respectfully, &c.,

"G. BOMFORD,

"Colonel of Ordnance.

"Major R. L. BAKER."

"ORDNANCE OFFICE,

"Washington, December 12, 1857.

"SIR: I have to acknowledge your letter of the 11th instant, in relation to the number of men under the command of Major R. L. Baker, at Allegheny arsenal, in the years 1828 to 1837, both inclusive, and in reply have to state that the number of men reported in the letter alluded to by you from the colonel of ordnance to Major Baker, of February 1, 1838, embraced all the persons under his orders, hired as well as enlisted.

"Respectfully, &c.,

"H. K. CRAIG,

"Colonel of Ordnance.

"JOHN D. MCPHERSON, Esq.,

"Deputy Solicitor Court of Claims, Washington."

All that the letters show is, that during the years in question, namely, from 1828 to 1834, the claimant had a command at Allegheny arsenal; that the highest number of officers and men under his command there in any one of those years was ninety-one; that the number in the other years ranged from seventy-seven to eighty-five; that some of the men were enlisted and some hired, but how many of each kind is not stated.

There is nothing in those facts to show that the claimant had the command of a battalion during any part of said time.

A case somewhat similar to the present one occurred in the circuit court of the United States for the district of Massachusetts. The defendant, in a suit against him by the government, claimed the brevet pay of a lieutenant colonel. The court, in an opinion against the claim, said: "By the army regulations of 1825, which governed this question till 1836, (3 How., 564,) it was provided that a lieutenant colonel by brevet must be considered to exercise a command equal to his brevet rank when he commanded a battalion. We entertain an opinion that whatever meaning may, at times, be affixed to the word battalion, it must, by the spirit of this regulation and the laws connected with it, be construed to mean here, at least, two organized companies, with their requisite officers as well as men." (*United States vs. Freeman*, 1 Woodbury and Minot, 45.)

The claimant, to show that his command at said arsenal entitled him to the pay and emoluments claimed, relies on a decision of Mr. Poinsett, Secretary of War. That decision is copied into the petition. The main part of it is as follows:

"It appears that the command held by Major Baker from the year 1828 to the present time is one of the first importance in his corps, and fully equal, in its numerical force and responsibility, to the com-

mand of a major of ordnance ; and accordingly the department sanctioned his application for the pay and allowances of his brevet rank from the 1st of August, 1837, but deemed it proper that a retrospective allowance, involving an amount not included in previous estimates and appropriations, should receive the sanction of Congress."

We do not know what evidence was before Mr. Poinsett, and, of course, can form no opinion as to the correctness of his decision relative to the numerical force of the claimant's command. If, however, the Secretary means, by the word "responsibility," anything in addition to numerical force, we think that he is, so far, mistaken. The claimant's responsibility, arising from the value of public property in his charge, cannot affect the case. The act of Congress of 1818, when speaking of a command according to brevet rank, means a command of men, not a care of public property ; and the army regulation of 1825, when speaking of a command equal to brevet rank, means a command of men. And said act and regulation both mean a command of men belonging to the army.

The claimant's brevet rank did not of itself entitle him to the pay and emoluments of a major. Notwithstanding his brevet commission, he remained limited to the command and pay of a captain under his lineal commission until he should be assigned, by proper authority, to the command of a battalion in the army, and until, in consequence of such assignment, he should actually exercise that command, and then only for the time of its actual exercise.

But there is no evidence that the claimant, either with or without orders, ever commanded a battalion, that is, at least two organized companies. The whole number of officers and enlisted men and hired men under him during any of the time aforesaid did not exceed ninety-one ; and for aught that appears, two-thirds or more of the men may have been mere hired laborers for daily or monthly wages. It is impossible, therefore, from the evidence, to say that the claimant had under him, at any portion of the time referred to, any number of enlisted men which it was not his duty to command as a captain of ordnance.

It is objected by the solicitor that, at all events, there is no ground for this claim, because the claimant was acting in his own corps ; but we have not found it necessary to examine that point.

It is the opinion of the court that the claimant has no cause of action.



